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Settlement of commercial disputes
Model legislative provisions on international commercial conciliation

Note by the Secretariat

Contents

		Page
Introduction		2
Revised articles of model legislative provisions		4
Article 1.	Scope of application	4
Article 2.	Conciliation	6
Article 3.	International conciliation	7
Article 4.	Variation by agreement	8
Article 5.	Commencement of conciliation proceedings	9
Article 6.	Number of conciliators	10
Article 7.	Appointment of conciliators	11
Article 8.	Conduct of conciliation	12
Article 9.	Communication between conciliator and parties	14
Article 10.	Disclosure of information	15
Article 11.	Termination of conciliation	16
Article 12.	Limitation period	17
Article 13.	Admissibility of evidence in other proceedings	18
Article 14.	Role of conciliator in other proceedings	20
Article 15.	Resort to arbitral or judicial proceedings	22
Article 16.	Arbitrator acting as conciliator	24
Article 17.	Enforceability of settlement	25
Notes		27

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Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.[7]

6. At the close of its thirty-fourth session, the Working Group requested the Secretariat to prepare revised drafts of those articles, based on the discussion in the Working Group, for consideration at its next session (A/CN.9/487, para. 20). This note contains a revised draft of model legislative provisions on conciliation.

Revised articles of model legislative provisions on international commercial conciliation

Article 1. Scope of application

(1)[1] These model legislative provisions apply to international commercial* conciliation, as defined in articles 2 and 3,

(a) if the place of conciliation, as agreed upon by the parties or, in the absence of such agreement, as determined with the assistance of the conciliator or panel of conciliators, is in this State; or[2]

(b) if the place of conciliation has not been agreed or otherwise determined as provided for in subparagraph (a)[3], the place of conciliation is deemed to be in this State if any of the following places is in this State: the place of the institution that administered the conciliation proceedings; the place of residence of the conciliator or the place of business of both parties if that place is in the same country.

(2) These model legislative provisions also apply to a commercial conciliation that is not international in the sense of article 3 if the parties have [expressly] agreed that the model legislative provisions are applicable to the conciliation.[4]

Remarks

1. At its thirty-fourth session, the Working Group expressed the view that the territorial factor should be listed as the first factor to be taken into account when determining the applicability of the draft legislative provisions. Such a restructuring was intended to make it clear that the territorial factor was to be the default rule triggering application of the model legislative provisions in the absence of other elements listed under paragraph (1), such as the international nature of conciliation or the agreement of the parties to opt in to the model legislative provisions (A/CN.9/487 para.91).

2. To increase certainty as to the when the model legislative provisions would apply, the Working Group agreed to include a provision in paragraph (1) to the effect that the parties would be free to agree upon the place of conciliation and, failing that agreement, it would be for the conciliator or the panel of conciliators, to determine that place (ibid., para.92. See also A/CN.9/WG.II/WP.113/Add.1, footnote 2). The new paragraph follows draft wording proposed at the thirty-fourth session of the Working Group.

3. The Working Group agreed that article 1 should address cases where the place of conciliation had not been agreed upon or determined and where, for other reasons, it was not possible to establish the place of conciliation. Possible criteria suggested for the applicability of the model legislative provisions might be, for example, the place of the institution that administered the conciliation proceedings, the place of residence of the conciliator, or the place of business of both parties if that place was in the same country (ibid., para. 93).

4. The question of the possibility for the parties to opt into the model legislative provisions was discussed by the Working Group at its thirty-fourth session in the context of draft article 3 (ibid., paras. 107-109). It was agreed that the provision should be worded along the lines of "the parties have [expressly] agreed that these model legislative provisions are applicable". It is submitted that draft article 1, which defines the scope of the model legislative provisions, is a more appropriate place for such a provision than draft article 3.

(3) Articles ... apply also if the place of conciliation is not in this State.[5]

(4) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of one party after a dispute has arisen, in compliance with a mutual agreement of the parties made before the dispute arose, or pursuant to a direction or [request] [invitation] of a court or competent governmental entity.[6]

Remarks

5. Paragraph (3) is intended to indicate whether certain provisions (such as those on the admissibility of evidence in other proceedings, the role of the conciliator in other proceedings or the limitation period) should produce effects in the enacting State even if the conciliation proceedings took place in another country and would thus not generally be covered by the law of the enacting State (A/CN.9/485 at paras. 120 and 134 and A/CN.9/487). The Working Group agreed to further consider the issues dealt with in paragraph (3) in light of decisions yet to be made with respect to draft articles 12, 13, 14 and 15.

6. This paragraph has been redrafted to take into account the consensual nature of conciliation. The initiative of a party would not be sufficient to carry out a consensual process, since the other party would, at least have to agree with that initiative (A/CN.9/487, para. 95). Although it noted that, in some countries, it was inconceivable that a conciliation could result from a "direction" of the court, the Working Group nonetheless agreed that the model legislative provisions should apply to such instances of mandatory conciliation given that, in some countries, conciliation was regarded by legislation as a necessary step to be taken before litigation could be initiated (ibid., para. 96). This paragraph has been redrafted to cover three possible situations namely: (a) where an agreement to conciliate pre-existed the dispute (for example, where a general provision had been made in a contract that possible future disputes would be settled through conciliation); (b) where an agreement to conciliate was made by the parties after the dispute arose; (c) where conciliation was imposed on or suggested to the parties by a court, an arbitral tribunal or an administrative entity.

(5) These model legislative provisions do not apply to:

(a) cases where a judge or an arbitrator, in the course of adjudicating a particular dispute, conducts a conciliatory process; and

(b) [...].[7]

*** The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.**

Remark

7. The inclusion of a provision allowing enacting States to exclude certain situations from the sphere of application of the model legislative provisions was found to be generally acceptable by the Working Group (ibid., para. 98). The guide to enactment should provide illustrations and explanations as to the situations that were likely to be regarded by enacting legislators as exceptional cases where the model legislative provisions should not apply. With a view to avoiding undue interference with existing procedural law, subparagraph (a) has been added to exclude from the scope of the model legislative provisions situations where the judge or arbitrator, in the course of adjudicating a particular dispute, conducts a conciliatory process, either at the request of the disputing parties or exercising his or her prerogatives or discretion (see also ibid., para. 103). Other areas of exclusion to be specified by enacting States might include collective bargaining relationships between employers and employees (A/CN.9/WG.II/WP.113/Add.1, footnote 5).

References to previous UNCITRAL documents

A/CN.9/487, paras. 88-99;
A/CN.9/WG.II/WP.113/Add.1, paras. 2-3;
A/CN.9/485, paras. 111-116;
A/CN.9/WG.II/WP.110, paras. 87-88 and 90.

Article 2. Conciliation[8]

For the purposes of these model legislative provisions, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import[9], whereby parties request a third person, or a panel of persons, to assist them [in an independent and impartial manner][10] [and without the authority to impose a binding decision on the parties][11] in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship.

Remarks

8. At its thirty-fourth session, the Working Group recalled that draft article 2 was aimed at setting out the elements for the definition of conciliation, taking account of the agreement of the parties, the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an impartial and independent third person or persons who assisted the parties in an attempt to reach an amicable settlement. These elements, it was recalled, distinguished conciliation from arbitration on the one hand, and mere negotiations (either between the parties or between representatives of the parties) on the other (A/CN.9/487, para. 101).

9. Support was expressed in the Working Group for retention of the words "whether referred to by the expression conciliation, mediation, or an expression of similar import". The Working Group noted that different procedural styles and techniques might be used in practice to facilitate dispute settlement and that different expressions might be used to refer to those styles and techniques and it was agreed that the model legislative provisions should encompass all these styles and techniques (ibid., para. 104).

10. The Working Group decided that a decision as to whether these words were necessary for the definition of conciliation would be made at its thirty-fifth session. A suggestion was made that the words should be deleted as they could be understood as introducing a subjective element to the definition of conciliation and could also be understood as establishing a legal requirement whose violation would have consequences beyond the model legislative provisions and might even be understood as an element for determining the applicability of the model legislative provisions. A contrary view was that the phrase ought to be retained on the basis that it emphasized the nature of conciliation. The Working Group agreed to place the words in square brackets (ibid., para. 102).

11. The words in square brackets ("and without the authority to impose a binding decision on the parties") are intended to reflect the suggestion made at the thirty-fourth session of the Working Group that draft article 2 should clarify that the conciliator was a person who did not have authority to impose a binding decision on the parties (ibid., para. 103).

References to previous UNCITRAL documents

A/CN.9/487, paras. 100-104;
A/CN.9/WG.II/WP.113/Add.1, paras. 3-4;
A/CN.9/485, paras. 108-109;
A/CN.9/WG.II/WP.108, para. 11;
A/CN.9/460, paras. 8-10.

Article 3. International conciliation[12]

(1) A conciliation is international if:

(a) the parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States;

or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of conciliation; or

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; [13]

Remarks

12. At its thirty-fourth session, the Working Group agreed that the acceptability of the model legislative provisions might be greater if no attempt was made to interfere with domestic conciliation and thus agreed that, subject to any agreement by the parties to opt into the legal regime set forth in the model legislative provisions, the instrument should be limited in scope to international conciliation (A/CN.9/487, para. 106).

13. A widely shared view in the Working Group was that the previous draft of paragraph (1)(c) ("or parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country") should be revised on the basis that it was inappropriate to combine in a single paragraph objective criteria such as the place of conciliation and a subjective test such as the agreement of the parties to opt into the legal regime set forth in the model legislative provisions. It was considered that, if the parties wished to opt into the model legislative provisions, they should be permitted to do so directly by the effect of an appropriate statement to be included in article 1 rather than by a fiction regarding the location of the subject-matter of the dispute. An opposite view was that such an opt-in provisions could be included in the definition of "international" as was done in the UNCITRAL Model Law on International Commercial Arbitration. After discussion, the prevailing view was that the provision should be reworded along the lines of "the parties have [expressly] agreed that these model legislative provisions are applicable". The Secretariat was requested to prepare a revised draft containing those words and to place it at an appropriate location in the draft model legislative provisions (ibid., paras. 107-109). The provision currently appears as paragraph (2) of draft article 1.

(2) For the purposes of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) if a party does not have a place of business, reference is to be made to the party's habitual residence.

References to previous UNCITRAL documents

A/CN.9/487, paras. 105 – 109;
A/CN.9/WG.II/WP.113/Add.1, para. 4;
A/CN.9/485, paras. 117 – 120;
A/CN.9/WG.II/WP.110, para. 89.

Article 4. Variation by agreement

Except as otherwise provided in these model legislative provisions, the parties may agree to exclude or vary any of these provisions.[14]

Remark

14. The text of draft article 4 used to be the last paragraph of draft article 1 (see A/CN.9/487, para. 99). With a view to emphasizing the prominent role given by the model legislative provisions to the principle of party autonomy, that provision has been isolated in a separate article. This type of drafting is also intended to bring the model legislative provisions more closely in line with other UNCITRAL instruments (e.g., article 6 of the United Nations Convention on Contracts for the International Sale of Goods, article 4 of the UNCITRAL Model Law on Electronic Commerce, and article 5 of the UNCITRAL Model Law on Electronic Signatures). A formulation even closer to that of those existing texts would be along the following lines "The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law". Expressing the principle of party autonomy in a separate article may further reduce the desirability of repeating that principle in the context of a number of specific provisions of the draft legislative provisions, as considered by the Working Group.

References to previous UNCITRAL documents

A/CN.9/487, para. 99;
A/CN.9/WG.II/WP.113/Add.1, paras. 2-3 (footnote 6);
A/CN.9/485, para. 112;
A/CN.9/WG.II/WP.110, para. 87.

Article 5. Commencement of conciliation proceedings

(1) The conciliation proceedings in respect of a particular dispute commence on the day on which the parties to the dispute agree to engage in conciliation proceedings.[15]

(2) If a party that invited another party to conciliate does not receive a reply within [fourteen] days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.[16] [17]

Remarks

15. At its thirty-fourth session, the Working Group agreed that paragraph (1) of this article should be harmonized with paragraph (3) of draft article 1 to accommodate the fact that a conciliation might be carried out as a consequence of a direction or request by a dispute settlement body such as a court or arbitral tribunal (A/CN.9/487, para. 111). The general reference to the "day on which the parties to the dispute agree to engage in conciliation proceedings" would seem to cover the different methods by which parties may agree to engage in conciliation proceedings. Such methods may include, for example, the acceptance by one party of an invitation to conciliate made by the other party, or the acceptance by both parties of a direction or suggestion to conciliate made by a court. Those examples may need to be spelled out in the guide to enactment.

16. A suggestion that time should start to run from the day on which the invitation to conciliate was received was rejected by the Working Group on the basis that the provision was modelled on paragraph (4) of article 2 of the UNCITRAL Conciliation Rules and that it was desirable to maintain harmony between the two texts (ibid., para. 112). However, it was agreed that, in view of the increased use of modern means of communication, the time period of thirty days might be shortened to two weeks (ibid., paras. 112-113). The Working Group noted that, since paragraph (2) did not deal with the commencement of conciliation proceedings, it could be included elsewhere in the draft model legislative provision (ibid., para. 115). The Working Group also noted that a final decision as to the need for maintaining the draft article and as to its precise contents should be made after the Working Group had considered in particular draft article 12 and possibly draft article 11 (ibid., para. 115).

17. It was suggested to the Working Group that draft article 5 should address the situation where an invitation to conciliate was withdrawn after it had been made (ibid., para. 114). No specific provision to that effect (such as a provision specifying that the party initiating the conciliation is free to withdraw the invitation to conciliate until that invitation has been accepted) has been added to the text of draft article 5 in view of the need to avoid interfering with the law of contract formation by introducing new rules as to the conditions under which an offer or an acceptance to conciliate might be withdrawn. It is submitted that a specific provision regarding the withdrawal of an invitation to conciliate is probably superfluous in view of the possibility offered to both parties to terminate conciliation proceedings at any time under subparagraph (d) of draft article 11.

References to previous UNCITRAL documents

A/CN.9/487, paras. 110-115;
A/CN.9/WG.II/WP.113/Add.1, para. 4;
A/CN.9/485, paras. 124 and 127-132;
A/CN.9/WG.II/WP.110, paras. 95-96.

Article 6. Number of conciliators

There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.[18]

Remarks

18. At its thirty-fourth session, the Working Group agreed with the substance of draft article 6 (A/CN.9/487, para. 117).

References to previous UNCITRAL documents

A/CN.9/487, paras. 116-117;
A/CN.9/WG.II/WP.113/Add.1, para. 5.

Article 7. Appointment of conciliators

(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.[19]

(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) a party may request such an institution or person to recommend names of suitable persons to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Remark

19. Although a suggestion was made at the thirty-fourth session of the Working Group that the appointment of each conciliator should be agreed to by both parties, the prevailing view was that the solution in the present draft was more practical, allowed for speedy commencement of the conciliation process and might actually foster settlement in the sense that the two party-appointed conciliators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement (A/CN.9/487, para. 119).

References to previous UNCITRAL documents

A/CN.9/487, paras. 118-119;
A/CN.9/WG.II/WP.113/Add.1, para. 5.

Article 8. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, upon the manner in which the conciliation is to be conducted.[20]

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, any [views] [expectations] [intentions] [wishes] that the parties may express, and the need for a speedy settlement of the dispute.[21]

Remarks

20. At the thirty-fourth session of the Working Group, there was broad agreement for casting paragraph (1) along the lines of article 19 of the UNCITRAL Model Law on International Commercial Arbitration and to stress that the parties were free to agree on the manner in which the conciliation was to be conducted. The words in square brackets "[, by reference to a standard set of rules or otherwise,]" were approved, subject to the deletion of the term 'standard". A suggestion that paragraph (1) should be deleted and that paragraph (2) should provide that the conciliator should be able to decide on the manner in which the conciliation proceedings should be conducted, did not receive support (A/CN.9/487, para. 121).

21. The Working Group agreed that the term "wishes" was unusual for inclusion in legal provisions but noted that, if a more appropriate term could not be found then it could be retained in light of the fact that it was used in the UNCITRAL Conciliation Rules (ibid., para. 122). With a view to providing more objective wording, the terms "views", "expectations" and "intentions" are offered as possible alternatives.

(3) The conciliator shall be guided by principles of [objectivity, fairness and justice][objectivity, impartiality and independence] and seek to maintain fairness in treatment as between the parties.[22]

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.[23]

Remarks

22. Some concern was expressed in the Working Group regarding the inclusion of a general statement of principles in the model legislative provisions. It was stated that, by providing courts with a yardstick against which to measure the conduct of conciliators, the first sentence of paragraph (3) could have the unintended effect of inviting parties to seek annulment of the settlement agreement through court review of the conciliation process. It was thus suggested that the statement of principles should be located in the guide to enactment. However, the prevailing view was to retain the guiding principles in the body of the legislative provisions to provide guidance regarding conciliation, including for less experienced conciliators. Paragraph (3) offers two variants. The first variant reflects the decision made by the Working Group that "objectivity, fairness and justice" should be retained as one option (ibid., para. 125). The second variant reflects the view that "impartiality and independence" were to be preferred over words such as "fairness and justice" on the basis that the latter terms connoted the role of a decision maker (such as a judge or an arbitrator) rather than the role of a conciliator, and that using the English word "fairness" might cause difficulties in translation. The draft also reflects the principle that both parties should receive equal treatment from the conciliator (ibid., para. 129). The Working Group decided that the second sentence in the previous draft of paragraph (3) ("Unless otherwise agreed by the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties"), to the extent that it dealt with elements to be taken into account in the substance of the settlement agreement, would be more appropriately reflected in the guide to enactment (ibid., para. 126).

23. Despite some expressions of doubt as to the usefulness of this paragraph, the Working Group agreed that paragraph (4) should be retained (ibid., para. 127).

References to previous UNCITRAL documents

A/CN.9/487, paras. 120-127;
A/CN.9/WG.II/WP.113/Add.1, para. 5;
A/CN.9/485, paras. 121-125;
A/CN.9/WG.II/WP.110, paras. 91-92;
A/CN.9/468, paras. 56-59;
A/CN.9/WG.II/WP.108, paras. 61-62.

Article 9. Communication between conciliator and parties

Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.[24]

Remark

24. The Working Group agreed to the substance of draft article 9. Whilst agreement was expressed for the idea that the model legislative provisions should reflect the principle that both parties should receive equal treatment from the conciliator, the Working Group decided against inclusion of such a formal rule in draft article 8 (ibid., para. 129). The general idea that both parties should receive equal treatment is reflected in draft article 8.

References to previous UNCITRAL documents

A/CN.9/487, paras. 128-129;
A/CN.9/WG.II/WP.113/Add.1, para. 6;
A/CN.9/485, para. 126;
A/CN.9/WG.II/WP.110, para. 93;
A/CN.9/468, paras. 54-55;
A/CN.9/WG.II/WP.108, paras. 56-57.

Article 10. Disclosure of information

When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators may disclose the substance of that information to the other party. However, the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.[25]

Remark

25. Of the two alternatives considered at the previous session (A/CN.9/487, para. 130), alternative 1 was preferred as the better option to ensure circulation of information between the various participants in the conciliation process. It was agreed that the confidentiality provision should apply in all cases, even without a specific agreement of the parties. On that basis the words "the parties are free to agree otherwise, including that" have been deleted (ibid., para. 132). A suggestion that the term "factual information" should be used instead of "information" was rejected on the basis that the latter term was preferable as it covered all relevant information and avoid difficulties that might arise in interpreting what was meant by "factual" information. The guide to enactment to article 10 should make it clear that the notion of "information" should be understood as covering also communications that took place before the actual commencement of the conciliation.

References to previous UNCITRAL documents

A/CN.9/487, paras. 130-134;
A/CN.9/WG.II/WP.113/Add.1, para. 6;
A/CN.9/WG.II/WP.110, para. 94;
A/CN.9/468, paras. 54-55;
A/CN.9/WG.II/WP.108, paras. 58-60.

Article 11. Termination of conciliation

The conciliation proceedings are terminated:

(a) by the conclusion[26] of the settlement agreement by the parties, on the date of the agreement;

(b) by a written declaration of the conciliator or the panel of conciliators[27], after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Remarks

26. At its thirty-fourth session, the Working Group agreed to replace "the signing" with "the conclusion" to better accommodate the use of electronic commerce (A/CN.9/487, para. 136. See also A/CN.9/WG.II/WP.113/Add.1, footnote 23).

27. The view was expressed that subparagraph (b) might need to address the situation where the conciliation proceedings were conducted by a panel of conciliators but the proceedings were declared as terminated by only one or more of its members of the panel (ibid., para. 136). The Working Group might wish to decide whether the model legislative provisions should provide that, where there is more than one conciliator, all members of the panel should act jointly and the declaration should originate from the entire panel of conciliators. In that respect, it may be recalled that article 3 of the UNCITRAL Conciliation Rules stipulates that "Where there is more than one conciliator, they ought, as a general rule, to act jointly". That provision is thus clearly worded in terms of a recommendation and not an obligation. Another reason for which the model legislative provisions might not seek to impose that conciliators should act jointly is the variety in the procedural situations in which the conciliators might intervene to terminate the proceedings. Depending on the procedural style adopted by the parties and the panel, the decision might be made by consensus of all members of the panel but also by the presiding conciliator or through delegation by the panel to one of its members. The Working Group may wish to decide whether it would be appropriate for model legislative provisions to enter into that level of procedural detail.

References to previous UNCITRAL documents

A/CN.9/487, paras. 135-136;
A/CN.9/WG.II/WP.113/Add.1, para. 6;
A/CN.9/485, para. 133.

Article 12. Limitation period

[(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement.][28]

Remark

28. Despite strong opposition to the retention of draft article 12 (for reasons set out in full in A/CN.9/487, para. 138), the Working Group at its thirty-fourth session agreed to retain the draft article on a provisional basis for continuation of discussion at a later stage. A question was raised as to whether the effect of the draft article was to interrupt or merely to suspend the running of the limitation period. In that context, it may be recalled that, at its thirty-third session, the Working Group noted that there were essentially three ways in which conciliation proceedings might affect the running of the limitation period. One possibility was that after the limitation period was interrupted by the commencement of the conciliation proceedings it would start to run anew. Another possibility was that, if the conciliation ended without a settlement, the limitation period would be deemed to have continued to run as if there had been no conciliation. In such a case there might be a need for an additional grace period if in the meantime the limitation period had expired or had run close to expiry. That approach was reflected in a draft provision before the Working Group that was modelled on article 17 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974). A third option was that, during the conciliation period, the limitation period would not run and would resume running from the time the conciliation ended unsuccessfully. Of the three, that last option (referred to also as the "chess clock" solution or, in some legal systems, as "suspension") received considerable support (see A/CN.9/485, para. 138).

References to previous UNCITRAL documents

A/CN.9/487, paras. 137-138;
A/CN.9/WG.II/WP.113/Add.1, para. 6;
A/CN.9/485, paras. 133-138;
A/CN.9/468, paras. 50-53;
A/CN.9/WG.II/WP.108, paras. 53-55.

Article 13. Admissibility of evidence in other proceedings[29]

(1) [Unless otherwise agreed by the parties,] a party who participated in the conciliation proceedings or a third person[30] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that is or was[31] the subject of the conciliation proceedings:[32]

(a) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute[33];

(b) Statements or admissions[34] made by a party in the course of the conciliation proceedings;

Remarks

29. At its thirty-fourth session, the Working Group expressed general support for the policy underlying draft article 13, namely, that it was designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph (1) in any later proceedings (A/CN.9/487, para. 140).

30. Broad support was expressed for retaining the words "or a third person" as necessary to ensure that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings were also bound by paragraph (1). However doubt was expressed whether it was appropriate for a third person to be bound by paragraph (1), in particular if the parties to the conciliation controlled the extent to which those third persons were so bound (by virtue of the words "unless otherwise agreed by the parties") (ibid.). The Working Group may wish to make a final decision regarding that issue. It should be noted that the words "or a third person" would seem to cover also the conciliator. The Working Group may wish to discuss whether draft article 13 should be made subject to draft article 14 (see below the discussion of the relationship between paragraph (1) of draft article 13 and paragraph (2) of draft article 14 at remark 39).

31. The Working Group noted that conciliation proceedings might still be continuing at the time when paragraph (1) became applicable (ibid.). To cover that situation, the paragraph has been redrafted to refer to a "dispute that is or was" the subject of conciliation proceedings.

32. There was support in the Working Group for a suggestion that, where information of the type covered by paragraph (1) had been generated before and in anticipation of conciliation proceedings, such information should also be covered by the draft article (ibid.). The Working Group may wish to discuss further the implications of that suggestion. In particular, attention might be given to the ways in which "information generated before and in anticipation of conciliation proceedings" might be defined to avoid creating an overly broad and unspecific exception to well-established procedural rules.

33. It was suggested that the appropriate balance for distinguishing between evidence that was to be covered by the provision and evidence that remained outside of it would be achieved by deleting the words "matters in dispute" and replacing the word "admissions" with the words "statements or admissions" and maintaining the substance of paragraph (4) (ibid., para. 141).

34. Ibid.

(c) Proposals made by the conciliator;

(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

(2) Paragraph (1) of this article applies irrespective of [the form of the information or evidence referred to therein] [whether the information or evidence referred to therein is in oral or written form]. [35]

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings].

(4) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.

(5) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation.

Remark

35. Paragraph (2) has been introduced with a view to reflect the agreement reached by the Working Group that, if there was any doubt that the provision covered oral as well as written evidence, it should be made clear in the provision that the draft article covered any information or evidence, regardless of its form (ibid., para. 141)

References to previous UNCITRAL documents

A/CN.9/487, paras. 139-141;
A/CN.9/WG.II/WP.113/Add.1, para. 7;
A/CN.9/485, paras. 139-146;
A/CN.9/WG.II/WP.110, paras. 98-100;
A/CN.9/468, paras. 22-30;
A/CN.9/WG.II/WP.108, paras. 18-28;
A/CN.9/460, paras. 11-13.

Article 14. Role of conciliator in other proceedings

(1) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

(2) Evidence given by the conciliator[36] regarding the matters[37] referred to in paragraph (1) of article 12 or regarding the conduct of either party during the conciliation proceedings[38], is not admissible in any arbitral or judicial proceedings [whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation proceedings] [in respect of a dispute that was or is the subject of the conciliation proceedings] [39].

Remarks

36. At the thirty-fourth session of the Working Group, a view was taken that the term "testimony of the conciliator" used in the previous draft was too narrow in the context of paragraph (2) and that words such as "evidence given by the conciliator" should be preferred (A/CN.9/487, para. 143).

37. The Working Group expressed support for replacing the word "facts" with a word such as "matters" or "information" (ibid.).

38. Support was expressed in the Working Group for broadening the scope of the prohibition provided in paragraph (2) to include testimony by a conciliator that a party acted in bad faith during the conciliation (ibid.).

39. The Working Group noted that paragraph (1) of draft article 13 applied in arbitral or judicial proceedings whether or not those proceedings related to the dispute that was the subject of the conciliation proceedings, whereas the scope of paragraph (2) of draft article 14 was narrower in that it referred to arbitral or judicial proceedings in respect of a dispute that was the subject of conciliation proceedings (ibid.). It is suggested that the text of paragraph (2) of draft article 14 should be in line with that of paragraph (1) of draft article 13. The first optional wording between square brackets aligns the situation of the conciliator under paragraph (2) of draft article 14 with that of a "third person" under paragraph (1) of draft article 13. It could be argued that the "third person" in draft article 13 does not cover the conciliator because of the specific provision contained in draft article 14. Even in that case, however, the policy in draft articles 13 and 14 may need to be aligned to ensure that certain information regarding the conciliation is kept confidential. As a matter of general policy, the Working Group may wish to determine whether it is desirable to establish a general prohibition for the conciliator to give evidence in any conceivable arbitral or judicial proceedings regarding the broad range of information listed under subparagraphs (a) to (d) of paragraph (1) of draft article 13. The second optional wording between square brackets is the wording considered by the Working Group at its thirty-fourth session. Should that wording be maintained, it would conflict with paragraph (1) of draft article 13, particularly if the reference to "a third person" in draft article 13 is to be understood as covering also the conciliator and not only such third persons as experts and witnesses (see above, remark 30). The Working Group might therefore need to reconsider the policy embodied in paragraph (1) of draft article 13.

(3) [Paragraph (1) applies] [Paragraphs (1) and (2) apply][40] also in respect of another dispute that has arisen from the same contract [or any related contract].[41]

Remarks

40. Depending on the decision made by the Working Group regarding the bracketed language in paragraph (2), it may be superfluous to refer to evidence given by the conciliator regarding "another dispute" under paragraph (3).

41. Of the three formulations before the Working Group (set out in ibid., para. 142) support was expressed for the broadest possible formulation offered. However, it was observed that the word "related" and some terms References to previous UNCITRAL documents that might be used to express that concept in other language versions, were complex and had given rise to difficulties of interpretation (ibid., para. 144).

A/CN.9/487, paras. 142-145;
A/CN.9/WG.II/WP.113/Add.1, para. 8;
A/CN.9/485, paras. 147-153;
A/CN.9/468, paras. 31-37;
A/CN.9/WG.II/WP.108, paras. 29-33;
A/CN.9/460, paras. 14-15.

Article 15. Resort to arbitral or judicial proceedings

(1) During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.[42]

Remarks

42. At its thirty-fourth session, the Working Group expressed support for the substance of paragraph (1). It was noted that paragraph (1) would serve a function even if draft article 11, which dealt with the effect of conciliation on the limitation period, were to be retained, since the claimant might want to initiate arbitral or judicial proceedings for a purpose other than suspending the running of the limitation period (A/CN.9/487, para. 147). The Working Group may wish to discuss further the implications of the second sentence of paragraph (1). As currently drafted, it leaves each party with very broad discretion to determine whether initiating arbitral or judicial proceedings is "necessary for preserving its rights". For example, any application for interim measures of protection could easily be described as "necessary for preserving the rights" of the applicant. The probability that the second sentence might be used to defeat the first sentence of paragraph (1) thus seems very high.

(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has occurred] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal [until the terms of the agreement have been complied with]].[43]

[(3) The provisions of paragraphs (1) and (2) of this article do not prevent a party from approaching an appointing authority requesting it to appoint an arbitrator.]

Remark

43. Support was expressed for the substance of paragraph (2), including the words placed between square brackets within the paragraph. It was considered that agreements to conciliate should be binding on the parties, in particular where the parties had expressly agreed not to initiate adversary proceedings until they had tried to settle their disputes by conciliation. It was pointed out that paragraph (1), which allowed initiation of arbitral or judicial proceedings in certain circumstances, and paragraph (2), which did not permit initiation of arbitral or judicial proceedings before the parties complied with their commitment to conciliate, sought to achieve possibly conflicting results and that the operation of the two provisions should be coordinated and clarified (ibid., paras. 148-149). Subject to any redrafting of the second sentence of paragraph (1), the Working group may wish to determine whether the matter would be sufficiently clarified by making paragraph (2) "subject to paragraph (1) of this article" or whether the second sentence of paragraph (1) would need to be reproduced within the text of paragraph (2). Alternatively, the Working Group may wish to discuss whether the guide to enactment should clarify why paragraph (2) should not reproduce the type of exception embodied in the second sentence of paragraph (1). For example, it might be explained that paragraph (1) applies once the conciliation proceedings have started and the exception in the second sentence may become necessary if the conciliation proceedings last over a long period of time. However, paragraph (2) deals with a presumably short period commencing after the dispute has arisen. Typically, the parties would agree not to initiate adversary proceedings in order to facilitate negotiations or conciliation and there might be no compelling reason to provide an exception to override an express and deliberate agreement of the parties.

References to previous UNCITRAL documents

A/CN.9/WG.II/WP.113/Add.1, para. 8;
A/CN.9/485, paras. 154-158;
A/CN.9/468, paras. 45-49;
A/CN.9/WG.II/WP.108, paras. 49-52.

Article 16. Arbitrator acting as conciliator

[It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.][44]

Remark

44. At the thirty-fourth session of the Working Group, the view was expressed that draft article 16 should be deleted because its focus was on actions that could be taken during arbitral proceedings rather than actions taken during conciliation proceedings. Therefore, if that provision was needed at all, its proper place was legislation that dealt with arbitration. Moreover, it was recalled that during the discussion of draft article 1(4), the Working Group discussed the possibility of excluding from the scope of the draft model legislative provisions those situations where an arbitrator would conduct a conciliation pursuant to his or her procedural prerogatives or discretion (A/CN.9/487, para. 103; see above, remark 7). If that were to be the case, the draft article might be deleted. However, if the draft model legislative provisions would also cover situations where an arbitrator, in the course of arbitral proceedings, undertook to act as a conciliator, the substance of draft article 16 would remain useful. In such a case, it was suggested to express the idea of draft article 16 in draft article 1. The Secretariat was requested to prepare on the basis of those discussions a draft, possibly preparing alternative solutions (A/CN 9/487, para. 152). If the model legislative provisions should deal with a conciliation process conducted by an arbitrator, this might need to be clarified in draft article 1 by a provision along the lines of "These model legislative provisions apply also where na arbitrator, to the extent agreed by the parties, acts as a conciliator".

References to previous UNCITRAL documents

A/CN.9/487, paras. 151-152;
A/CN.9/WG.II/WP.113/Add.1, para. 8
A/CN.9/485, para. 159;
A/CN.9/WG.II/WP.110, paras. 103-104;
A/CN.9/468, paras. 41-44;
A/CN.9/WG.II/WP.108, paras. 44-48

Article 17. Enforceability of settlement[45]

[Variant A]

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the settlement agreement, that agreement is binding and enforceable ***[the enacting State inserts provisions specifying provisions for the enforceability of such agreements].*** [46]

Remarks

45. At its thirty-fourth session, the Working Group noted that legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differed widely. Some States had no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts had been restated in some laws on conciliation. It was also noted that several laws contained provisions to the effect that a written settlement agreement was to be treated as an award rendered by an arbitral tribunal and was to produce the same effect as a final award in arbitration, provided that the result of the conciliation process was reduced to writing and signed by the conciliator or conciliators and the parties or their representatives. According to another approach found in one national law, the settlement agreement was deemed to be an enforceable title, and the rights, debts and obligations that were certain, express, and capable of being enforced, and that were recorded in the settlement agreement were enforceable pursuant to the provisions established for the enforcement of court decisions. It was pointed out, however, that that approach was used with respect to conciliation administered by approved institutions where the conciliators were selected from a list maintained by an official organ. In yet other laws, it was provided that conciliation settlements were treated as arbitral awards, but that such settlements "might, by leave of the court" be enforced in the same manner as a judgement, this wording appearing to leave a degree of discretion to the court in enforcing the settlement. The view was expressed that the draft model legislative provisions might give recognition to a situation where the parties appointed an arbitral tribunal with the specific purpose of issuing an award based on the terms settled upon by the parties. Such an award, envisaged in article 30 of the UNCITRAL Model Law on International Commercial Arbitration, would be capable of enforcement as any arbitral award. Other settlements, according to that view, were to be regarded as contracts and to be enforced as such. Under that view, the model legislative provisions should merely state the principle that the settlement agreement was to be enforced, without attempting to provide a unified solution as to how such settlement agreements might become "enforceable", a matter that should be left to the law of each enacting State. According to other views, however, it would be useful, in order to increase the attractiveness of conciliation, to endow settlements reached during conciliation with the possibility of enforcement. Accordingly, it was considered desirable to prepare a harmonized statutory provision for States that might wish to enact it. After discussion, the Secretariat was requested to prepare a revised version of draft article 16, with possible variants to reflect the various views that had been expressed and the legislative approaches that had been discussed (A/CN.9/487, paras. 154-159).

46. Variant A is the text considered by the Working Group at its thirty-fourth session. It purports to reflect the view that the model legislative provisions should merely state the principle that the settlement agreement is enforceable, without attempting to provide a unified solution as to how such settlement agreements might become "enforceable", a matter that should be left to the law of each enacting State. Examples of solutions provided under national laws may be given in the guide to enactment.

[Variant B]

If the parties reach agreement on a settlement of the dispute, that agreement is binding and enforceable as a contract.[47]

[Variant C]

If the parties reach agreement on a settlement of the dispute, they may appoint an arbitral tribunal, including by appointing the conciliator or a member of the panel of conciliators, and request the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms. [48]

[Variant D]

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the settlement agreement, that agreement is binding and enforceable as an arbitral award.[49]

Remarks

47. Variant B reflects the widely shared view that, in determining its enforceability, a settlement agreement should be dealt with as a contract. Under that variant, the settlement agreement is not requested to be signed by the parties and the conciliator or the panel of conciliators in order not to interfere with existing contract law through the imposition of specific form requirements for the formation of that contract.

48. Variant C is based on article 30 of the UNCITRAL Model Law on International Commercial Arbitration. It offers a basic procedural framework as to how a settlement agreement may become expressed in the form of an arbitral award.

49. Variant D reflects the view that, in determining its enforceability, a settlement agreement should be dealt with as a an arbitral award. That variant offers no indication as to the procedure through which such an arbitral award is produced. The guide to enactment may need to provide guidance regarding the meaning of the words "enforceable as an arbitral award", for example by reference to the more detailed provisions of articles 30, 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration.

References to previous UNCITRAL documents

A/CN.9/487, paras. 153-154;
A/CN.9/WG.II/WP.113/Add.1, para. 9
A/CN.9/485, para. 159;
A/CN.9/WG.II/WP.110, paras. 105-112;
A/CN.9/468, paras. 38-40;
A/CN.9/WG.II/WP.108, paras. 34-42;
A/CN.9/460, paras. 16-18.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[2] Ibid., paras. 340-343.

[3] Ibid., paras. 344-350.

[4] Ibid., paras. 371-373.

[5] Ibid., paras. 374 and 375.

[6] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[7] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-315.